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No. 83-5878

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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ALFRED B. SHAPIRO and GREGORY J. WENTZ, PETITIONERS

v.

DRUG ENFORCEMENT ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

REX E. LEE
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Petitioners contend that an individual who is barred from access to his agency records under Exemption (j)(2) of the Privacy Act, 5 U.S.C. 552a(j)(2), may nevertheless obtain disclosure of those records under the Freedom of Information Act.

1. Petitioners were each convicted, in unrelated cases, of violating the controlled substances laws, specifically 21 U.S.C. 841. While they were serving their respective sentences, petitioners filed separate requests with the Drug Enforcement Administration seeking access to their files pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Privacy Act, 5 U.S.C. 552a. Pet. App. 1a-2a. The DEA denied the requests on the ground that all of the documents sought are contained within systems of criminal justice records that are exempt from access pursuant to regulations promulgated under Exemption (j)(2) of the Privacy Act, 5 U.S.C. 552a(j)(2). See

28 C.F.R. 16.98. The DEA further asserted that Privacy Act Exemption (j)(2) is a withholding statute within the meaning of FOIA Exemption 3 (5 U.S.C. 552(b)(3)), and that therefore the relevant records are also exempt from disclosure under the FOIA. Pet. App. 2a.

Petitioners filed separate actions in the United States District Court for the Western District of Wisconsin, seeking an order compelling the DEA to release their respective records. The district court consolidated the two cases for purposes of decision and upheld the agency's denial of the requests (Pet. App. 19a-24a).

The court of appeals affirmed (Pet. App. 1a-18a; 721 F.2d 215). The court held that the records sought by petitioners had been properly exempted from access by agency regulation pursuant to Privacy Act Exemption (j)(2) (Pet. App. 2a-6a). In addition, the court concluded that Exemption (j)(2) is a FOIA Exemption 3 statute (Pet. App. 6a-17a). Thus, the court ruled that the records at issue may be withheld under both the Privacy Act and the FOIA. In reaching this result, the court recognized (Pet. App. 7a-8a) that its holding is consistent with the Fifth Circuit's decision in Painter v. FBI, 615 F.2d 689 (1980), but is in conflict with the decisions of two other circuits. Provenzano v. United States Department of Justice, 717 F.2d 799 (3d Cir. 1983), petition for cert. pending, No. 83-1045; Porter v. United States Department of Justice, 717 F.2d 787 (3d Cir. 1983); Greentree v. United States Customs Service, 674 F.2d 74 (D.C. Cir. 1982).

2. Petitioners contend that Exemption (j)(2) of the Privacy Act is not a withholding statute within the meaning of FOIA Exemption 3. We agree with petitioners that this question, as to which there is a conflict among the circuits, warrants review by this Court. We therefore have filed a petition for a writ of certiorari seeking review of this question in United States

Department of Justice v. Provenzano, No. 83-1045.1/ Accordingly we suggest that the Court defer disposition of the instant petition pending its disposition of our petition in Provenzano.2/

It is therefore respectfully submitted that the petition for a writ of certiorari should be held and disposed of as appropriate in light of this Court's disposition of the petition for certiorari in United States Department of Justice v. Provenzano, No. 83-1045.

REX E. LEE
Solicitor General

MARCH 1984

1/ We have sent petitioners' counsel a copy of our petition in Provenzano.

2/ Although the questions presented in the two cases are identical, there is a substantial reason why it would be appropriate to hold this case pending a decision in Provenzano. We note, pursuant to Rule 46.5 of the Rules of this Court, that there is some question whether one of petitioners is entitled to proceed in forma pauperis. In the papers supporting his request to proceed in forma pauperis, petitioner Shapiro indicates that he is employed and earns $1,500 per month. Because this means that Shapiro earns $18,000 per year, it is most unlikely that he meets the standard for proceeding in forma pauperis set out in 28 U.S.C. 1915. See Adkins v. DuPont, 335 U.S. 331, 339 (1948). See also, e.g., Brown v. Herald Co., Inc., No. 82-6778 (Oct. 31, 1983) (denying motion for leave to proceed in forma pauperis); Garcia v. United States, No. 82-5934 (June 13, 1983) (same). Any uncertainty regarding Shapiro's right to proceed in forma pauperis should be clarified while the issue common to these cases is resolved in Provenzano.